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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ANTHONY W. CVELBAR,

Petitioner,

v.

CBI-ILLINOIS, INC.,
a Delaware corporation,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a one-person employment agreement which provides severance benefits is an ERISA Plan.

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THIS CASE BY COURTS OR ADMINISTRATIVE AGENCIES

Anthony W. Cvelbar v. CBI-Illinois, Inc., United States Court of Appeals for the Seventh Circuit, Case No. 96-1669, Opinion decided February 14, 1997.

Anthony W. Cvelbar v. CBI-Illinois, Inc., a Delaware corporation, United States District Court for the Central District of Illinois, Case No. 95-1127, Final Order entered February 27, 1996.

Anthony W. Cvelbar v. CBI-Illinois, Inc., a Delaware corporation, United States District Court for the Central District of Illinois, Case No. 95-1127, Memorandum Opinion dated February 7, 1996 denying Plaintiff's Motion to Amend.

Anthony W. Cvelbar v. CBI-Illinois, Inc., a Delaware corporation, United States District Court for the Central District of Illinois, Case No. 95-1127, Order entered January 16, 1996 granting Defendant's Motion for Partial Summary Judgment and Denying Plaintiff's Motion for Partial Summary Judgment and Plaintiff's Motion to Strike.

STATEMENT OF THE BASIS FOR JURISDICTION IN THIS COURT

On February 14, 1997, the United States Court of Appeals for the Seventh Circuit decided its Case No. 96-1669, and on the same date entered its Opinion and Order, which Opinion and Order the Plaintiff-Petitioner seeks this Court to review and reverse.

The statutory provision believed to confer on this Court jurisdiction to review the above Opinion and Order on a Writ of Certiorari is 28 U.S.C. §1254.

STATUTES INVOLVED IN THIS CASE

29 U.S.C. § 1132.

§1132. Civil enforcement

(a) Persons involved to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(a) for the relief provided for in subsection c of this section, or

(b) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan . . .

29 U.S.C. § 1002.

§1002. Definitions

For purposes of this subchapter:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment or vacation benefits, apprenticeship or other training programs or day care centers, scholarship funds, or pre-paid legal services, for (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death and insurance to provide such pensions) . . .

(2) . . .

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

STATEMENT OF THE CASE

This Petition seeks review of a judgment of the United States Court of Appeals for the Seventh Circuit. The basis of federal jurisdiction in the court of first instance, the United States District Court for the Central District of Illinois, Peoria Division, was 28 U.S.C. §1331, relying upon ERISA (29 U.S.C. §1001, *et seq.*) as the law of the United States.

Plaintiff entered into an Agreement with his employer on March 22, 1990 which provided for severance benefits upon separation from employment for any reason.

On February 7, 1995, Plaintiff filed a two count Complaint in the Circuit Court of the Tenth Judicial Circuit of Illinois claiming that the Defendant had violated an Employer-Employee Agreement (hereinafter "Agreement") by wrongfully terminating the monthly payments due Plaintiff. Count I alleged that the termination of payments violated ERISA; Count II alleged a common law breach of contract claim.

On March 23, 1995, the Defendant removed the claim to the United States District Court for the Central District of Illinois, Peoria Division, pursuant to 28 U.S.C. §1441. On March 29, 1996, the Defendant filed a Motion to Dismiss the ERISA claim on the ground that the Agreement does not qualify as a ERISA Plan.

The District Court ruled that the Agreement qualified as an ERISA Plan, and both parties subsequently filed Motions for Partial Summary Judgment on the issue of whether the Agreement was a "golden parachute" under 26 U.S.C. §280G. On January 16, 1996, the District Court granted Defendant's Motion for Partial Summary Judgment.

On February 7, 1996, the District Court ordered the parties to file status reports indicating what issues remain

to be litigated. Plaintiff claimed that, even if any part of the payments he received under the Agreement were parachute payments under §280G, the Court must determine the value of a covenant not to compete because such amount is due Plaintiff under the Agreement regardless of the 299% limitation under §280G. This issue was not raised by either party's Motion for Partial Summary Judgment. Defendant claimed there were no remaining issues. The District Court entered final judgment on February 27, 1996 in favor of the Defendant.

Plaintiff appealed to the United States Court of Appeals for the Seventh Circuit on various issues, including the question presented in this Petition for Writ of Certiorari. The Seventh Circuit decided, on February 14, 1997, to affirm the District Court completely, including holding that the one person Agreement is an ERISA Plan.

REASONS FOR GRANTING THE WRIT

The question presented is whether a one-person employment agreement which provides for severance benefits is an ERISA Plan.

The Petition for Writ of Certiorari should be allowed for two reasons. First, a United States Court of Appeals has entered a decision in conflict with the decision, not only of itself, but of another United States Court of Appeals on the same important issue. Second, the United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court in order to provide uniformity among the judiciary.

In holding that the Agreement is an ERISA Plan, the Seventh Circuit directly contradicted its own holding in *Nagy v. Riblet Products Corporation*, 79 F.3d 572 (7th

Cir. 1996), and contradicted the holding of the Fourth Circuit Court of Appeals in *Fraver v. North Carolina Farm Bureau Mutual Insurance Co.*, 801 F.2d 675 (4th Cir. 1986), and decisions by District Courts in the Ninth and Tenth Circuits in *Jervis v. Elerding*, 504 F.Supp. 606 (C.D. Cal. 1980), *Nechero v. Provident Life & Accident Insurance Co.*, 795 F.Supp. 374 (D.N.M. 1992) and *Lakey v. Whitehall Corp.*, 704 F.Supp. 201 (D. Kan. 1988). The cases cited above hold that a one person employment agreement which provides for post termination severance benefits is not an ERISA Plan, and thus any dispute involving such an agreement is not governed by ERISA.

Because the decision by the Seventh Circuit in the present case holding that a one-person employment agreement is an ERISA Plan is in conflict with the cases cited above, this Court should review the Seventh Circuit's holding on this issue on the present Petition for Writ of Certiorari.

Furthermore, this Court should review the Seventh Circuit decision because the present issue is an important question of federal law that has not yet been, but should be, settled by this Court in order to establish uniformity for the benefit of the judiciary and parties dealing in this area. H.R. Rep. No. 93-533, 93d Cong., 2d Sess. states Congress enacted ERISA to ". . . protect working men and women from abuses in the administration and investment of private retirement plans and employee welfare plans." Congress did not intend to burden the federal government with the administration of individual employment contracts providing for severance benefits, most of which are between corporations and sophisticated highly compensated employees, such as the Petitioner in this case. ERISA was not meant to govern these types of contracts, and the federal government should not be burdened with enforcing and administering these types of contracts.

CONCLUSION

WHEREFORE, Petitioner prays this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 96-1669

ANTHONY W. CVELBAR,

Plaintiff-Appellant,

v.

CBI ILLINOIS INCORPORATED,

Defendant-Appellee.

Appeal from the United States District Court
for the Central District of Illinois, Peoria Division.
No. 95 C 1127—**Michael M. Mihm**, *Chief Judge.*

ARGUED SEPTEMBER 11, 1996—DECIDED FEBRUARY 14, 1997

Before COFFEY, RIPPLE and EVANS, *Circuit Judges.*

RIPPLE, *Circuit Judge.* Anthony W. Cvelbar signed an agreement with his employer that extended benefits to him in the event of his termination. His employer later merged with the appellee, CBI Illinois Incorporated ("CBI"), which agreed, as part of the merger agreement, to honor the contract. Mr. Cvelbar subsequently was terminated. After paying benefits for some time, CBI invoked the limitation provision of the contract and discontinued the benefits. Mr. Cvelbar brought suit in state court alleging that he was entitled to continued payments under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* After removal, the district court held that the decision to terminate the

benefits was not arbitrary or capricious and entered summary judgment in CBI's favor. Mr. Cvelbar now appeals that decision. We conclude that the district court had subject matter jurisdiction and affirm its judgment.

I
BACKGROUND

A. *Facts*

Anthony W. Cvelbar was employed as the Executive Vice President of The First National Bank of Peoria. In March 1990, he entered into an Employer-Employee Agreement ("Agreement") with the bank. That Agreement provided that the bank would pay Mr. Cvelbar severance benefits in the event he was terminated, voluntarily or involuntarily, for any reason other than death, retirement, or the commission of a felony or fraud. The Agreement further provided that Mr. Cvelbar would not compete with First Peoria by accepting employment with a competitor institution for three years following termination. First Peoria entered into similar agreements with four other employees.

Central to this appeal is the interpretation of several provisions of the Agreement. We therefore shall set forth those provisions in more detail. The Agreement stated that its purpose is "to encourage the continued dedication of the management of the Company and its subsidiaries, including [Mr. Cvelbar], to the business of the Company and to discourage [Mr. Cvelbar] from seeking employment with a competitor." R.7, Ex.A at 1. Encouraging loyalty from managers such as Mr. Cvelbar was deemed essential because of such managers' "intimate knowledge of the products, operating procedures and customers" of First Peoria. *Id.*

The three benefits that would be provided to Mr. Cvelbar should he be terminated are enumerated in the third paragraph of the contract:

(i) The Company shall make available to the Employee and his dependents coverage under the group medical plan on the same terms and conditions as are then available to a retiree of the First Peoria Corp. Retirement Plan in effect at that time.

(ii) The Company shall pay the Employee a lump sum severance payment equal to the lesser of (a) 200% of the Employee's last five-year average annual compensation including any bonuses and director's fees, or (b) 50% of the number of years, or fraction thereof, remaining until the Employee's normal retirement date under the First Peoria Corp. Retirement Plan times the Employee's last five-year average annual compensation including any bonuses and director's fees.

(iii) The Company shall pay the Employee a monthly payment of an amount equal to the deferred pension amount payable under the First Peoria Corp. Retirement Plan at age 65, assuming a life only option, from the date of termination of the Employee's employment until he attains the age of 65 or until he begins receiving benefits under the First Peoria Corp. Retirement Plan, whichever occurs first.

R.7, Ex.A at 3 ¶ 3. Paragraph four placed a limitation on the payment of any benefits that may become due under the Agreement. The provision, entitled "Limitation on Amounts Payable," provided:

Notwithstanding anything contained in this Agreement to the contrary, in the event any payment to be made or benefit to be provided to the Employee pursuant to this Agreement is deemed, in the sole opinion of Company's counsel, to be contingent on a "change in ownership or control" or otherwise would be subject to the provisions of Section 280G of the Internal Revenue Code of 1986, as amended (the Code), then the total amount of payments or benefits

> to be provided to the Employee pursuant to this Agreement shall be reduced so that the aggregate present value of all said payments does not exceed 299% of the Employee's Average Annual Compensation as defined in the Code.

R.7, Ex.A at 3-4 ¶ 4.A. In addition, First Peoria promised to use its best efforts to require any successor to assume expressly the obligations of the Agreement. Mr. Cvelbar's right to payments was to vest at the time of his termination, and Judith A. Cvelbar was to receive the benefits in the event that Mr. Cvelbar died after termination with benefits remaining.

On June 1, 1992, the bank merged with CBI Illinois, Inc. As a result of the merger, CBI assumed the bank's duties under the Employer-Employee Agreement.[1] CBI terminated Mr. Cvelbar in October 1992. In his affidavit, Peter W. Callow, the President of CBI, testified that he made the decision to terminate because Mr. Cvelbar "exhibited a negative attitude toward the new ownership at Commerce Bank after the merger which took place on June 1, 1992." R.19 at 2. After Mr. Cvelbar's termination, CBI made payments under the Agreement until December 1994. At that time, CBI's counsel, James L. Swarts, determined that, because some of the payments made to Mr. Cvelbar were "contingent on a 'change in ownership or control' or otherwise . . . subject to the

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[1] Paragraph 12.10 of the merger contract between CBI and First Peoria effected the assumption: "[T]he Surviving Corporation shall honor[ ] the obligations of [First Peoria] under the five written Employer-Employee Agreements . . . ." R.34, Ex.1. This paragraph also provided that CBI would seek a letter ruling from the Internal Revenue Service "with respect to certain legal issues concerning payments" to be made under the Employer-Employee Agreements. *Id.* First Peoria and CBI agreed to accept the resolution of the issues as determined by the IRS.

provisions of Section 280G," the limitation provision contained in paragraph four applied.[2] Therefore, counsel decided, Mr. Cvelbar no longer deserved benefits because he already had been paid more than 299% of his Average Annual Compensation.

B. *Proceedings in the District Court*

Mr. Cvelbar filed an action in state court alleging that, under ERISA and state contract law, he was due continued benefits. After removal, the district court granted partial summary judgment to CBI and denied partial summary judgment to Mr. Cvelbar. Prior to the district court's grant of partial summary judgment, a magistrate judge, in a report and recommendation to the district court, had concluded that, under the four-part test of *Diak v. Dwyer, Costello & Knox, P.C.*, 33 F.3d 809 (7th Cir. 1994), the Agreement is an ERISA plan, the rights under which can be litigated in federal court. The magistrate judge reasoned that a reasonable person reading

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[2] Swarts relied on the legislative history of § 280G, the proposed regulations interpreting § 280G, and the advice of outside counsel. In addition, before making his determination, Swarts reviewed paragraph 12.10 of the merger contract between First Peoria and CBI, *see supra* note 1. He also reviewed the request for a letter ruling that had been prepared in accordance with paragraph 12.10, along with the IRS's response to the request.

The request for a letter ruling dated April 10, 1992 asked whether the payments to be made under the five Employer-Employee Agreements, including Mr. Cvelbar's, would qualify as "parachute payments" under § 280G of the Internal Revenue Code of 1986. In a private letter ruling dated January 8, 1993, the IRS replied that "a reasonable value attributable to th[e] refraining from performing services [under the Agreements' covenants not to compete] will not be a parachute payment under section 280G(b)(2)(A)." R.34, Ex.3.

the Agreement "'could ascertain the intended benefits, beneficiaries, source of financing, and procedures for receiving the benefits.'" R.5 at 3 (quoting *Diak*, 33 F.3d at 812). Before the district court, neither party objected to the magistrate judge's determination, and the district court did not address independently the issue of subject matter jurisdiction.

With respect to the merits, the parties contested whether the benefit payments qualify as "parachute payments" under 26 U.S.C. § 280G. Mr. Cvelbar urged that, because the payments did not constitute such payments, the limitation provision of the Agreement did not apply, and he was entitled to continued payments. However, the district court agreed with CBI that whether the payments to Mr. Cvelbar were actually parachute payments is irrelevant because the Agreement gives discretion to CBI's counsel to resolve that matter. Therefore, the controlling issue, according to the court, was whether CBI's counsel's determination that the payments were contingent on a change in ownership or control was arbitrary or capricious. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). The court held that CBI's interpretation was reasonable in light of the IRS's Proposed Regulations.

In its order rendering partial summary judgment, the district court ordered the parties to submit status reports detailing the issues, if any, that remained to be litigated. In his status report, Mr. Cvelbar submitted that the court ought to determine "what part of the payments [Mr. Cvelbar] received are 'parachute payments.'" R.41. Referring to its earlier order, the district court concluded that this assertion failed to raise issues that were relevant to Mr. Cvelbar's ERISA claim because he had not established that the action of the administrator in terminating payments was arbitrary or capricious. The court then determined that its earlier grant of partial summary judgment had resolved all of the issues be-

tween the parties and entered final judgment in favor of CBI.

II

DISCUSSION

On appeal, Mr. Cvelbar suggests for the first time that his Agreement is not a "plan" within the meaning of ERISA. He contends that individual contracts between individual employees and employers providing for post-termination benefits do not qualify as "plans" under ERISA. He also maintains that the Agreement does not satisfy our *Diak* test because a reasonable person reading the three benefits-providing clauses could not ascertain the source of funding or the procedures for receiving the benefits. CBI responds that the Agreement is a "top-hat" plan, an ERISA plan that provides benefits for a select group of highly-paid managers.

After studying the briefs of the parties and hearing oral argument, the court invited the Secretary of Labor to submit a brief, as amicus curiae, addressing whether the district court had subject matter jurisdiction.[3] In his submission, to which the parties had the opportunity to respond, the Secretary submits that the Agreement is a plan, meeting the requirements of *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987) and *Diak*. The Secretary,

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[3] The Secretary has been charged by Congress with responsibility for interpreting and enforcing the definitional, coverage, reporting and disclosure, and fiduciary responsibility provisions of Title I of ERISA. *See* 29 U.S.C. §§ 1132, 1135. The Secretary therefore has a substantial interest in the proper interpretation of the provisions of ERISA that are at issue in this case.

The court expresses its appreciation to the Secretary for accepting the court's invitation to submit a brief as amicus curiae.

although pointing out that CBI had agreements similar to Mr. Cvelbar's with five other employees, maintains that an ERISA plan can cover a single employee.

Mr. Cvelbar next asserts that, even if the Agreement is a plan, CBI's termination of benefits was based on an arbitrary or capricious interpretation of the Agreement's limitation provision. Mr. Cvelbar further submits that extrinsic evidence, including the requested letter ruling in which the IRS opined that the part of Mr. Cvelbar's benefits that could be allocated to the covenant not to compete was not covered by § 280G, establishes that counsel's interpretation was unreasonable. CBI, on the other hand, believes that the terms of the Agreement are clear and support the decision of the district court.

We must deal with two issues. First, we must decide whether the federal courts have subject matter jurisdiction over this case on the ground that the Agreement is a "plan" under ERISA. Second, if we determine that ERISA controls, we must determine whether CBI's decision that some of Mr. Cvelbar's benefit payments were contingent on a change in ownership or control or otherwise were covered by 26 U.S.C. § 280G was arbitrary or capricious.

A. *Subject Matter Jurisdiction*

"[T]he existence of an 'ERISA-governed plan' is an essential precursor to federal jurisdiction." *UIU Severance Pay Trust Fund v. Local Union No. 18-U, United Steelworkers of America*, 998 F.2d 509, 510 n.2 (7th Cir. 1993). Therefore, if Mr. Cvelbar's agreement is not an ERISA "plan," the district court had no subject matter jurisdiction. It is not fatal that Mr. Cvelbar contended in the district court that his agreement is a plan. Nor is it fatal that neither party objected to the magistrate judge's conclusion that the district court had subject matter jurisdiction. Subject matter jurisdiction "cannot

be waived or be overcome by an agreement of the parties." *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934). A challenge to subject matter jurisdiction can be raised at any time. Indeed, had Mr. Cvelbar not raised the issue in this appeal, we would have had an independent duty to assess sua sponte our jurisdictional power. *See id.*; *Stearnes v. Baur's Opera House, Inc.*, 3 F.3d 1142, 1144 (7th Cir. 1993).

In assessing whether the district court had jurisdiction, we must determine whether the Agreement between Mr. Cvelbar and CBI is an ERISA plan. We begin with the text of the statute. ERISA section 502(a)(1)(B) states that "[a] civil action may be brought—(1) by a participant or beneficiary—(B) to recover benefits due to him under the terms of his plan [or] to enforce his rights under the terms of the plan . . . ." 29 U.S.C. § 1132(a)(1)(B) (bold face omitted). Section 3(3), in turn, states that "'plan' means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both . . . ." 29 U.S.C. § 1002(3). An "employer welfare benefit plan" is "any plan, fund, or program . . . established or maintained by an employer . . . for the purpose of providing . . . medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment." 29 U.S.C. § 1002(1).[4]

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[4] 29 U.S.C. § 1002(1) provides in full:

> The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation bene-

(continued...)

An "employee pension benefit plan" is "any plan, fund, or program . . . established or maintained by an employer . . . that . . . provides retirement income to employees, or . . . results in a deferral of income." 29 U.S.C. § 1002(2)(A).[5] Whether we have jurisdiction over this case turns, therefore, on whether the Agreement is a "plan, fund, or program." As the Supreme Court noted in *Fort Halifax*, these statutory definitions are tautological. 482 U.S. at 8. The statute's definitions of "plan," "employee welfare benefit plan" and "employee pension benefit plan" all contain the word "plan" within their definitions. To complete our analysis, therefore, we must look

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[4] (...continued)

> fits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

Id.

[5] 29 U.S.C. § 1002(2)(A) provides in full:

> Except as provided in subparagraph (B), the terms "employee benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—
>
> (i) provides retirement income to employees, or
>
> (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,
>
> regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

Id.

beyond the language of the statute; the precedents of the Supreme Court, this court, and the other circuits provide additional guidance. Those cases teach that an ERISA plan requires an ongoing administrative scheme, *id.* at 12, and that its terms must be reasonably ascertainable, *Diak v. Dwyer, Costello & Knox, P.C.*, 33 F.3d 809, 812 (7th Cir. 1994).

1. Ongoing Administrative Scheme

a.

In *Fort Halifax*, the Supreme Court considered a Maine statute that required employers who terminate or relocate operations to pay a lump-sum payment to their employees. The Court held that the Maine statute did not establish, or require employers to maintain, an ERISA plan:

> The requirement of a one-time, lump-sum payment triggered by a single event requires no administrative scheme whatsoever to meet the employer's obligation. The employer assumes no responsibility to pay benefits on a regular basis, and thus faces no periodic demands on its assets that create a need for financial coordination and control. Rather, the employer's obligation is predicated on the occurrence of a single contingency that may never materialize. The employer may well *never* have to pay the severance benefits. To the extent that the obligation to do so arises, satisfaction of that duty involves only making a single set of payments to employees at the time the plant closes. To do little more than write a check hardly constitutes the operation of a benefit plan. Once this single event is over, the employer has no further responsibility. The theoretical possibility of a one-time obligation in the future simply creates no need for an ongoing administrative program for processing claims and paying benefits.

482 U.S. at 12 (footnote omitted). The lump-sum nature of the Maine obligation weighed heavily in the Court's analysis because an ongoing administrative program typically is required in instances in which there are "ongoing benefits to be paid," *id.* at 14-15 n.9, and if there is a "regularity of payment," *id.* at 18 n.12.

Fort Halifax does not define comprehensively the precise contours of an "ongoing administrative program." The subsequent case law of the circuits, however, has provided significant guidance. For instance, our colleagues in the Eighth Circuit have set forth in a helpful manner the difference between the situation in *Fort Halifax* and those situations that require the implementation of an administrative scheme:

> The pivotal inquiry is whether the plan requires the establishment of a separate, ongoing administrative scheme to administer the plan's benefits. Simple or mechanical determinations do not necessarily require the establishment of such an administrative scheme; rather, an employer's need to create an administrative system may arise where the employer, to determine the employee's eligibility for and level of benefits, must analyze each employee's particular circumstances in light of the appropriate criteria.

Kulinski v. Medtronic Bio-Medicus, Inc., 21 F.3d 254, 257 (8th Cir. 1994).

The distinction between situations such as the one confronted by the Supreme Court in *Fort Halifax* and those that are characterized properly as plans is necessarily a "matter of degrees but under *Fort Halifax* degrees are crucial." *Simas v. Quaker Fabric Corp.*, 6 F.3d 849, 853 (1st Cir. 1993). As the Secretary of Labor notes, when, as in this case, the judicial task is to distinguish between individual severance benefit contracts and those situations that constitute ERISA plans, some "difficult line-drawing problems" can result. Amicus

Br. at 13. For instance, our case law in this area has noted that there can be severance agreements that are properly characterized as simple contracts between an employee and employer and do not constitute plans under ERISA. These contractual arrangements often bind an employer to enroll, or to keep enrolled, an employee in a pension or welfare benefit plan but do not in and of themselves constitute a benefit plan.[6] Other circuits have encountered similar situations.[7] In the case before us, for the reasons set forth in the following paragraphs, we agree with the Secretary that, when assessed in its totality, the arrangement before us does constitute a plan. We cannot accept Mr. Cvelbar's claim that the

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[6] *See Dranchak v. Akzo Nobel Inc.*, 88 F.3d 457, 459 (7th Cir. 1996) (noting that it is possible to draft severance agreements that are "unrelated" to a "plan," but noting that contract specifying how much to disburse from pension and welfare trusts in event of discharge is covered by ERISA); *Nagy v. Riblet Prods. Corp.*, 79 F.3d 572 (7th Cir. 1996) (holding suit as to whether employee was discharged for "cause" is a state law based employment action despite presence of provision requiring that employee continue to receive all salaries, benefits, bonuses, and other direct and indirect forms of compensation in case of discharge without cause); *Miller v. Taylor Insulation Co.*, 39 F.3d 755 (7th Cir. 1994) (discussing contract that required participation in benefit plans as "related" to ERISA plan but not constituting distinct benefit plan).

[7] *See Delaye v. Agripac, Inc.*, 39 F.3d 235 (9th Cir. 1994) (holding that contract calling for the continuation of pay at one of two set formulas depending upon reason for termination and for the continuation of insurance and vacation benefits was not a plan because sending a single employee a check every month and continuing to pay his insurance benefits for a time specified in the contract does not rise to the level of an ongoing scheme), *cert. denied*, 115 S. Ct. 1402 (1995); *Angst v. Mack Trucks, Inc.*, 969 F.2d 1530 (3d Cir. 1992) (holding that promise to pay lump sum and a year of continuing benefits in exchange for an employee's voluntary departure did not constitute a plan).

Agreement is a contract between an employer and individual employee providing for post-retirement or post-termination in-kind compensation that falls outside the definitional framework of ERISA.

b.

In the determination of whether an ERISA plan exists, arrangements that involve a single employee quite understandably have been met with a particularly careful scrutiny. In such situations, it is often more difficult to discern the sort of ongoing administrative management that Congress intended to subject to the regulation of ERISA. At the outset, therefore, we think that it is worth noting that it is not at all clear that it is appropriate to characterize the situation before us as a "one-person" plan. From Mr. Cvelbar's own affidavit, it appears that First Peoria signed similar contracts with four other top employees as part of an effort to retain top management during uncertain economic times. Indeed, the introduction of the Agreement states that its purpose is to obtain the loyalty of management-level employees. When counsel requested an opinion from the IRS about the tax treatment of Mr. Cvelbar's benefits, he referred to four similar contracts. The same mention was made in the First Peoria-CBI merger agreement and in the minutes of meetings of the First Peoria Board of Directors.

Even if we must characterize the arrangement before us as a one-person plan, we have no difficulty in holding that it is possible for a one-person arrangement to qualify as an ERISA plan. Certainly, the plain language of ERISA in no way excludes from coverage those situations in which only one employee is extended benefits. *See Williams v. Wright*, 927 F.2d 1540, 1545 (11th Cir. 1991) (also noting that ERISA's predecessor statute expressly excluded plans covering less than 25 employees). "ERISA is clearly a statute of general application, one that en-

visions inclusion within its ambit as the norm." *Smart v. State Farm Ins. Co.*, 868 F.2d 929, 933 (7th Cir. 1989). Moreover, the Department of Labor, although apparently taking a different position in the early days of its administration of the statute,[8] has concluded, and, indeed, reasserts as amicus curiae in this case, that a contract between one employee and an employer can be an employee benefit plan. *See Biggers v. Wittek Indus.*, 4 F.3d 291, 298 (4th Cir. 1993) (citing U.S. Dep't of Labor Op. Letter 91-20 A (July 2, 1991) and holding ERISA plan covered one employee); 29 C.F.R. § 2510.3-3(b) ("[A] Keogh plan under which one or more common law employees, in addition to the self-employed individuals, are participants covered under the plan, will be covered

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[8] *See* U.S. Dep't of Labor Op. Letter 76-110 (Sept. 28, 1976) (stating that individual contract to provide personal services did not constitute a pension benefit plan under ERISA); U.S. Dep't of Labor Op. Letter 76-79 (May 25, 1976) (stating that the contract under consideration was an employment agreement, not an ERISA plan); *Jervis v. Elerding*, 504 F. Supp. 606, 608 (C.D. Cal. 1980); *see also Fraver v. North Carolina Farm Bureau Mut. Ins. Co.*, 801 F.2d 675, 677-78 (4th Cir. 1986) (citing *Jervis* and holding that the buy-out agreements at issue "were simply employment or agency contracts" that do not pay retirement income), *cert. denied*, 480 U.S. 919 (1987); *Nechero v. Provident Life & Accident Ins. Co.*, 795 F. Supp. 374, 377 (D.N.M. 1992) (citing *Jervis* and stating that "ERISA does not reach purely individual contracts"); *Lackey v. Whitehall Corp.*, 704 F. Supp. 201, 204 (D. Kan. 1988) (citing *Jervis* and holding that contract's "deferred compensation provisions are terms included as part of the employment agreements with select individuals, and not an ERISA covered benefit plan"), *amended by* Civ. A. No. 85-2639-S, 1989 WL 21008 (D. Kan. Feb. 23, 1989); *McQueen v. Salida Coca-Cola Bottling Co.*, 652 F. Supp. 1471, 1472 (D. Colo. 1987) (citing *Jervis* and holding that, although *Jervis* did not establish a per se rule that an ERISA plan can never cover just one employee, the deferred compensation agreement at issue was a "personal services contract," not an ERISA plan).

under Title I [of ERISA]."). Although the position of the Secretary, even when contained in an opinion letter of the Department, is not binding upon this court, the views of the agency charged with the administration of the statute carry considerable weight. *See Williams*, 927 F.2d at 1544. We therefore agree with the courts that have decided that, as long as the benefits program meets the other requirements of an ERISA plan—namely, an ongoing administrative scheme and reasonably ascertainable terms—the program does not fall outside the ambit of ERISA merely because it covers only a single employee. *See id.* at 1545 ("[W]e conclude that a plan covering only a single employee, where all other requirements are met, is covered by ERISA.") (footnotes omitted); *cf. Duggan v. Hobbs*, 99 F.3d 307, 312 (9th Cir. 1996) (holding that contract between one top executive and company established a "top-hat" plan). Because we have concluded that the Agreement in this case meets those requirements, its status as an ERISA plan does not evaporate just because the Agreement is a contract between Mr. Cvelbar and the company.

c.

When we turn to a scrutiny of the entire arrangement that Mr. Cvelbar had with his employer, we must conclude that the Agreement constituted a plan to administer the benefits provided. Under the Agreement, the severance benefits were to be provided for three years following termination. Although triggered by the single event of Mr. Cvelbar's termination, the benefits extended to Mr. Cvelbar are not similar to the "one-time, lump-sum payment" considered in *Fort Halifax*, 482 U.S. at 12. CBI assumed a "responsibility to pay benefits on a regular basis" and faced "periodic demands on its assets that create a need for financial coordination and control." *Id.* During the three-year period after termination, the Agreement required that CBI process medical claims,

pay medical benefits to Mr. Cvelbar and his dependents, and make a monthly payment. Moreover, the contract in this case placed on First Peoria and CBI an ongoing responsibility to review the contract annually, while Mr. Cvelbar was still employed and the benefits had not yet vested, in order to decide whether to extend its terms for additional years. The companies thus undertook an ongoing responsibility different from that considered in *Fort Halifax* and similar to those the Supreme Court described as requiring an ongoing administrative program. In sum, to carry out the obligations assumed under Mr. Cvelbar's contract, CBI and First Peoria had to do more than merely "write a check." *Id.*

One factor to be considered in deciding "which obligations are complex enough to require" an ongoing administrative program, *Schonholz v. Long Island Jewish Med. Center*, 87 F.3d 72, 76 (2d Cir.), *cert. denied*, 117 S. Ct. 511 (1996), is "whether the employer's undertaking or obligation requires managerial discretion in its administration." *Id.* (citing *Bogue v. Ampex Corp.*, 976 F.2d 1319, 1323 (9th Cir. 1992), *cert. denied*, 507 U.S. 1031 (1993)); *see James v. Fleet/Norstar Fin. Group, Inc.*, 992 F.2d 463, 468 (2d Cir. 1993). Mr. Cvelbar's agreement required the exercise of such discretion. CBI initially had to determine the reason for Mr. Cvelbar's termination.[9] He

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[9] *See Schonholz*, 87 F.3d at 76 (holding that the plan at issue required more than "simple arithmetical calculations" and necessitated managerial discretion because company had to determine, inter alia, "whether the employee was involuntarily terminated" and "whether the termination was for either illegal conduct or substantially deficient performance"); *Simas v. Quaker Fabric Corp.*, 6 F.3d 849, 853-54 (1st Cir. 1993) (holding that whether an employee was fired "for cause" is a non-mechanical criterion which created the need for administrative obligations); *Bogue*, 976 F.2d at 1323 (similar); *Fontenot v. NL Indus.*, 953 F.2d 960, 963 (5th Cir. 1992) (noting that an ad-

(continued...)

would not have been eligible for benefits if he had, for example, retired or willfully engaged in fraud. Moreover, the company had to monitor whether Mr. Cvelbar competed against the company within three years of termination. If Mr. Cvelbar breached the covenant not to compete, he would lose the right to benefits and would have to refund any payments that had been made under the Agreement.[10] Once the payments were underway, CBI had to monitor the amount paid to Mr. Cvelbar. If, in the sole opinion of CBI's counsel, any of the payments due under the Agreement were parachute payments, the payments to Mr. Cvelbar were limited to 299% of his

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[9] (...continued)
ministrative scheme is required to analyze the circumstances of employee's discharge in light of criteria, but holding that program at issue did not require administrative scheme because employees were to receive benefits regardless of reason for termination).

[10] Paragraph 2 of the Agreement provided:

> The Employee agrees that for a period of three years from the date of termination, the Employee will not become employed as an agent, consultant, employee, officer or director of (i) a commercial bank, savings and loan association, savings bank or trust company with an office located in the Standard Metropolitan Statistical Area encompassing the City of Peoria, Illinois, as such area is defined by the U.S. Office of Management and Budget (the Peoria SMSA) or (ii) a bank holding company (as defined in the Bank Holding Company Act, 12 U.S.C. sec. 1841) which has an office, or has a subsidiary with an office, located in the Peoria SMSA.
>
> If the Employee breaches the terms of this paragraph, this Agreement shall terminate, no payments or benefits shall become payable thereafter, and all payments made under this Agreement shall be refunded by the Employee to the Company.

R.7, Ex.A at 2 ¶ 2.

Average Annual Compensation. The company also had to reevaluate the Agreement every year to determine whether it should be extended another year. All of these tasks required the exercise of managerial discretion.[11]

The payments to be made to Mr. Cvelbar could not be determined by simple arithmetical computations.[12] The medical benefits would vary over time, depending on the health needs of Mr. Cvelbar and his dependents. In addition, the contract extended medical coverage "under the group medical plan on the same terms and conditions as are then available to a retiree of the First Peoria Corp. Retirement Plan in effect at that time." R.7, Ex.A at 3 ¶ 3(i). Likewise, Mr. Cvelbar's monthly payments were to be "equal to the deferred pension amount payable under the First Peoria Corp. Retirement Plan at age 65, assuming a life only option." *Id.* at 3 ¶ 3(iii). The payments were to be made "from the date of termination . . . until [Mr. Cvelbar] attain[ed] the age of 65 or until he beg[an] receiving benefits under the First Peoria Corp. Retirement Plan, whichever occur[red] first." *Id.* To determine Mr. Cvelbar's eligibility and level of benefits, the company had to analyze his circumstances in light of First Peoria's existing retirement plan. The benefits to be paid Mr. Cvelbar therefore could not be calculated mechanically without administrative involvement.[13] By refer-

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[11] *See, e.g., Pane v. RCA Corp.*, 868 F.2d 631, 635 (3d Cir. 1989) (holding that severance agreements with small number of executives constituted an ERISA plan because it required an administrative scheme).

[12] *See James v. Fleet/Norstar Fin. Group, Inc.*, 992 F.2d 463, 468 (2d Cir. 1993) (holding that "simple arithmetical calculations and clerical determination" did not require an administrative plan).

[13] *See Kulinski*, 21 F.3d at 255, 257-58 (noting that analyzing employee's circumstances in light of criteria may necessitate

(continued...)

encing the First Peoria Corp. Retirement Plan, the Agreement not only required that the existing plan be maintained, but it required the company to make administrative determinations about coverage and eligibility, determinations that were not simple mechanical calculations.

2. Reasonably Ascertainable Terms

We have determined that the Agreement necessitated the establishment and maintenance of an ongoing administrative program. In addition, "'[i]n determining whether a plan, fund or program (pursuant to a writing or not) is a reality a court must determine whether from the surrounding circumstances a reasonable person could ascertain the intended benefits, beneficiaries, source of financing, and procedures for receiving benefits.'" *Diak v. Dwyer, Costello & Knox, P.C.*, 33 F.3d 809, 812 (7th Cir. 1994) (quoting *Donovan v. Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982) (en banc)).[14] Although the concerns underlying *Diak* are more acute when no writing exists to evidence the plan, a writing, standing alone, is not enough to convert a contract into an ERISA plan.

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[13] (...continued)
an administrative scheme and holding that agreements that were "entirely self-contained—[they] included no references to any outside criteria or standards"—were not ERISA plans); *Simas*, 6 F.3d at 853 (noting that discretion was involved in statute that cross-referenced other provisions that required the employer to determine whether the employee was fired for cause).

[14] Every circuit has adopted the *Donovan* approach for determining whether an ERISA plan has been created. *See Grimo v. Blue Cross/Blue Shield*, 34 F.3d 148, 151 (2d Cir. 1994); *Kenney v. Ronald Parson Contracting Corp.*, 28 F.3d 1254, 1257-58 (D.C. Cir. 1994) (collecting cases from the First, Third, Fourth, Fifth, Sixth, Eighth, Ninth and Tenth Circuits).

Some of these criteria are not in serious dispute in this case. A reasonable person easily could ascertain the benefits and beneficiaries of the Agreement. The benefits are listed explicitly in the Agreement. Mr. Cvelbar was to receive medical benefits, a lump-sum payment and a monthly payment. Similarly, the beneficiaries are explicit in the Agreement. The Agreement listed Mr. Cvelbar, his dependents and Judith Cvelbar as beneficiaries.

Mr. Cvelbar nevertheless insists that the source of financing and the procedures for receiving benefits are not reasonably ascertainable. We cannot agree. We held in *Diak* that the "payment of benefits out of general funds satisfies the requirement of an ascertainable source of funding." 33 F.3d at 813. As in *Diak*, a reasonable reading of the Agreement in this case leads to the conclusion that the medical benefits, lump sum and monthly payments were to be paid out of CBI's general funds. Moreover, because the Agreement references First Peoria's existing retirement plan, an examination of that plan would reveal the source of funds for the program upon which Mr. Cvelbar's terms were based.

Lastly, the procedures for Mr. Cvelbar's obtaining benefits were reasonably clear. By the terms of the Agreement, for him to become eligible and for his benefits to vest, Mr. Cvelbar would have to be terminated, voluntarily or involuntarily, as conditioned by the contract. He was entitled to a lump sum at the time of his termination. The medical coverage was to be made available at that time, and the terms and conditions of such coverage were contained in the First Peoria Corp. Retirement Plan. In addition, upon termination, he was to receive a payment each month. Consequently, a reasonable person could ascertain the procedures for receiving the Agreement's benefits.

B. *CBI's Decision to Terminate Payments*

Mr. Cvelbar challenges CBI's decision to invoke the limitation provision of the Agreement, thereby terminating Mr. Cvelbar's benefits. His "claim for severance benefits is a matter of contract interpretation." *Hickey v. A.E. Staley Mfg.*, 995 F.2d 1385, 1389 (7th Cir. 1993). In interpreting the Agreement, the district court was under a duty to determine whether the limitation provision was ambiguous. *Id.* If no ambiguity exists, extrinsic evidence should not be considered, and summary judgment is appropriate. *Ryan v. Chromalloy American Corp.*, 877 F.2d 598, 602 (7th Cir. 1989). "A term is ambiguous if it is subject to reasonable alternative interpretations." *Taylor v. Continental Group Change in Control Severance Pay Plan*, 933 F.2d 1227, 1232 (3d Cir. 1991).

The limitation provision in this case provided that the present value of the benefits to Mr. Cvelbar would not exceed 299% of his Average Annual Compensation if, "in the sole opinion of Company's counsel," "any payment" provided under the Agreement was "contingent on a 'change in ownership or control' or otherwise . . . subject to the provisions of Section 280G of the Internal Revenue Code of 1986." R.7, Ex.A at 3-4 ¶ 4.A. CBI's counsel decided that some of the payments to Mr. Cvelbar were so contingent. The district court correctly concluded that the limitation provision was not ambiguous. By its terms, it vests sole discretion in company counsel to determine whether any of Mr. Cvelbar's payments were parachute payments and therefore subject to the limitation provision.

Because the plan vests this discretion in its administrators to construe the limitation provision's terms, "the arbitrary and capricious standard of review is proper." *Loyola Univ. of Chicago v. Humana Ins. Co.*, 996 F.2d 895, 898 (7th Cir. 1993); *Allison v. Dugan*, 951 F.2d 828, 832 (7th Cir. 1992); *see Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). "Under the arbitrary

and capricious standard, a denial of benefits will not be set aside if the denial was based upon a reasonable interpretation of the plan documents." *Loyola Univ. of Chicago*, 996 F.2d at 898. "If the administrator makes an informed judgment and articulates an explanation for it that is satisfactory in light of the relevant facts, then the administrator's decision is final." *Id.* We emphasize that, in reviewing the determination of CBI's counsel, it is not our function to assess definitively whether we, if faced directly with the § 280G-coverage issue, would reach the same conclusion or even rely on the same authority. We need not decide whether any of Mr. Cvelbar's payments were actually parachute payments; we must decide merely whether such a determination is reasonable and therefore not arbitrary or capricious. It matters not whether counsel's interpretation of the tax laws was actually correct, but whether that interpretation was reasonable. *Cf. Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775, 781 (11th Cir. 1993) ("For an [arbitration] award to be vacated as arbitrary and capricious, the Panel's award must contain more than an error of law or interpretation."). Without passing on the question whether any of Mr. Cvelbar's payments were parachute payments, we hold that CBI's counsel's determination to that effect was not arbitrary or capricious.

CBI's counsel's determination that some of the benefit payments to Mr. Cvelbar were contingent on a change in ownership or control or otherwise subject to § 280G of the Internal Revenue Code was reasonable. Section 280G defines a "parachute payment" as "any payment in the nature of compensation . . . if—(i) such payment is contingent on a change—(I) in the ownership or effective control of the corporation, or (II) in the ownership of a substantial portion of the assets of the corporation, and (ii) the aggregate present value of the payments . . . exceeds" a certain amount. 26 U.S.C. § 280G(b)(2)(A) (bold face omitted). The legislative history of the section,

found in the House Conference Report, contains examples of parachute payments. One of the examples of a payment that is contingent on a change in ownership or control reads:

> Assume that a contract provides for payments to a disqualified individual contingent upon termination of his employment. A change of control occurs, and thereafter, as a result of the change, the employment of the individual is terminated. Payments under the contract are to be treated as contingent on the change in control.

H.R. Conf. Rep. No. 98-861, at 850-51 (1984), *reprinted in* 1984 U.S.C.C.A.N. 1445, 1539. This legislative history supports CBI's interpretation of Mr. Cvelbar's payments. His contract made his payments contingent upon his termination. A change in control, a merger, occurred. Mr. Cvelbar's termination resulted because, according to CBI's president, he did not get along with the post-merger management. CBI's interpretation of the Agreement's benefits, therefore, reasonably is supported by the House Conference Report, a document upon which we have relied as an authority in another case, *see Cline v. Commissioner*, 34 F.3d 480, 486 (7th Cir. 1994).

In addition to the House Conference Report, the Proposed Regulations provide support for counsel's interpretation of Mr. Cvelbar's benefits. One Proposed Regulation states:

> A payment is also generally treated as contingent on a change of ownership or control if—(1) The payment is contingent on an event that is closely associated with a change in ownership or control, (2) A change in ownership or control actually occurs, and (3) The event is materially related to the change in ownership or control.

Prop. Treas. Reg. § 1.280G-1, Q&A-22(b). The Proposed Regulation lists the termination of employment as an

example of "an event that is closely associated with a change in ownership or control." This Proposed Regulation reasonably supports counsel's decision that some of Mr. Cvelbar's payments were contingent on a change in ownership or control: His benefits were contingent on his termination, an event the Proposed Regulation classifies as one closely associated with a change in control. The change actually occurred in the form of a merger. Because Mr. Cvelbar's termination occurred within one year of the merger, according to the Proposed Regulation, it is presumed to be "materially related" to the change in control. *Id.* Apart from the presumption, his termination, in fact, may have been "materially related" to the change in control insofar as Mr. Cvelbar was unhappy with the new management that resulted from the merger.[15]

In his affidavit, CBI's counsel stated that he also relied on the merger contract between CBI and First Peoria, the request for an IRS letter ruling and the letter ruling itself in arriving at his conclusion to terminate Mr. Cvelbar's benefits. The merger agreement required CBI to obtain a ruling from the IRS. That ruling stated that a portion of Mr. Cvelbar's benefits, the portion that could be allocated to the covenant not to compete, was not a parachute payment. Counsel's determination is consistent with the requested letter ruling. The ruling stated that a portion of the payments was not covered by § 280G. The limitation provision of the Agreement applies, however, if "any payment" to Mr. Cvelbar was covered by § 280G. Therefore, our conclusion that counsel's actions were reasonable is not affected by the merger agreement or the letter ruling. Indeed, that counsel examined these documents before coming to a de-

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[15] *See also* Prop. Treas. Reg. § 1.280G-1, Q&A-22(e) (stating, as an example, a situation resembling Mr. Cvelbar's and noting that such payments are presumed to be contingent on a change in control).

cision bolsters our conclusion that his decision was an informed judgment.

Conclusion

For the foregoing reasons, the judgment of the district court is affirmed.[16]

AFFIRMED

A true Copy:

Teste: .

Clerk of the United States Court of Appeals for the Seventh Circuit

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[16] Mr. Cvelbar also submits that the district court entered summary judgment "sua sponte." The district court, after granting partial summary judgment to CBI, requested that the parties present a statement to the court detailing which issues remained to be litigated. In response, Mr. Cvelbar's only submission was that the court needed to decide "what part of the payments [Mr. Cvelbar] received are 'parachute payments.' " R.41. The district court correctly decided that this submission was irrelevant. Counsel's determination that "any payment" was contingent on a change in ownership or control activated the limitation provision. Therefore, it mattered not what specific portion of Mr. Cvelbar's benefits could be allocated to parachute payments as opposed to payments for the covenant not to compete. Under the plain language of the plan, if any payment was a parachute payment, the total amount of payments was governed by the 299% limit. Because Mr. Cvelbar failed to raise a genuine issue of material fact, summary judgment was appropriate. *See* Fed. R. Civ. P. 56; *Chicago Observer, Inc. v. City of Chicago*, 929 F.2d 325, 329 (7th Cir. 1991) ("Once it becomes clear that additional proceedings are pointless, the court should bring the case to a close."). The district court's entry of final judgment, in response to Mr. Cvelbar's failure, was not erroneous.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 10, 1997.

Before

Hon. JOHN L. COFFEY, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. TERENCE T. EVANS, Circuit Judge

ANTHONY W. CVELBAR,

Plaintiff-Appellant,

No. 96-1669 *v.*

CBI ILLINOIS INCORPORATED,
a Delaware Corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the Central District of Illinois, Peoria Division.
No. 95 C 1127—Michael M. Mihm, Chief Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed on February 27, 1997 by plaintiff-appellant, no judge in active service has requested a vote thereon, and the judges on the original panel have voted to deny the petition. Accordingly,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing en banc be, and the same is hereby DENIED.

(2)

Supreme Court, U.S.
FILED
MAY 19 1997
OFFICE OF THE CLERK

No. 96-1854

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ANTHONY W. CVELBAR,

Petitioner,

v.

CBI-ILLINOIS, INC.,
a Delaware corporation,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL APPENDIX

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Anthony W. Cvelbar v. CBI-Illinois, Inc., a Delaware corporation, United States District Court for the Central District of Illinois, Case No. 95-1127, Memorandum Opinion dated February 7, 1996 denying Plaintiff's Motion to Amend 5

Anthony W. Cvelbar v. CBI-Illinois, Inc., a Delaware corporation, United States District Court for the Central District of Illinois, Case No. 95-1127, Order entered January 16, 1996 granting Defendant's Motion for Partial Summary Judgment and Denying Plaintiff's Motion for Partial Summary Judgment and Plaintiff's Motion to Strike 8

[Dated February 27, 1996]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

ANTHONY W. CVELBAR,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 95-1127
	)	
CBI-ILLINOIS, INC., a Delaware Corporation,	)	
	)	
Defendant.	)	

ORDER

On June 20, 1995, Plaintiff, Anthony Cvelbar, filed a one-count Amended Complaint charging that Defendant, CBI-Illinois, Inc. ("CBI"), violated the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.* Specifically, Cvelbar claims that the CBI's decision to limit his benefits was wrongful under 29 U.S.C. § 1132(a)(1)(B). CBI moved for summary judgment, arguing that under *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109 S.Ct. 948 (1989), it had not behaved arbitrarily or capriciously.

On January 16, 1996, this Court entered partial summary judgment in favor of CBI. In that Order, this Court found that CBI had not acted either arbitrarily or capriciously in deeming Cvelbar's severance payments as contingent upon a change in ownership or control. Cvelbar filed a Motion to Amend under Fed.R.Civ.P. 59(e), which this Court denied. On February 7, 1996, this Court ordered the parties to file status reports indicating what

issues, if any, remained to be litigated. CBI's status report states that no issues remain and that final judgment should be entered on its behalf.

Cvelbar, on the other hand, argues that this Court must determine what part of the payments he received are "parachute payments." He depends, at least in part, on the fact that CBI sought a revenue ruling from the IRS. After paying some portion of Cvelbar's severance benefits, CBI sought a ruling from the IRS on the issue of whether the entire amount paid to him constituted a "parachute payment" under § 280G of the Internal Revenue Code. The IRS responded that a portion of the payments could be allocated to the covenant not to compete and avoid the label of "parachute payment". As a result, Cvelbar believes that this Court must determine the value of the covenant not to compete he entered into with CBI. Cvelbar is mistaken.

In the Order granting partial summary judgment in favor of CBI, this Court pointed out that this case arises from ERISA, not the Internal Revenue Code. The only issue before this Court in a claim for wrongful denial of benefits under § 1132(a)(1)(B) is whether the plan administrator acted either arbitrarily or capriciously. This Court held, at summary judgment, that Cvelbar failed to meet his burden as the non-movant in presenting evidence which created a genuine issue of material fact with regard to CBI's alleged wrongful conduct. This decision has nothing to do with whether the IRS has allowed CBI, for tax purposes, to allocate a portion of the severance payments to the covenant not to compete.

The Order of January 16, 1996 resolved all remaining issues in the case. This Court ORDERS the Clerk to

enter Final Judgement in favor of CBI-Illinois, Inc. FURTHER, this Court finds the Motion to Extend Time [#32] and the Amended Motion for Discovery [#42] MOOT. This matter is TERMINATED.

ENTERED this 27th day of February, 1996.

/s/_____
Michael M. Mihm
Chief United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

JUDGMENT IN A CIVIL CASE

ANTHONY W. CVELBAR,

vs. Case No. 95-1127

CBI ILLINOIS, INC, a Delaware Corporation; COMMERCE BANCSHARES INC., a Missouri Corporation; COMMERCE BANK N.A.; DAVID KEMPER, President of Commerce Bancshares, Inc.; G. ROLAND RANSOM, Vice President, Commerce Bancshares, Inc.; PETER CALLOW, President of Commerce Bank, N.A.

☒ DECISION BY THE COURT. This action came to hearing before the Court. The issues have been plead and heard and a decision has been rendered.

☐ IT IS ORDERED AND ADJUDGED that judgment is entered in favor of Defendants and against Plaintiff plus costs.

ENTER this 27th day of February, 1996.

JOHN M. WATERS, CLERK

/s/_____
BY DEPUTY CLERK

[Dated February 7, 1996]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

ANTHONY W. CVELBAR, Plaintiff,	)	
v.	)	Case No. 95-1127
CBI-ILLINOIS, a Delaware Corporation, Defendant.	)	

MEMORANDUM OPINION

Before this Court is Plaintiff's Motion to Amend Pursuant to Rule 59(e). On January 16, 1996, this Court entered an Order granting in part and denying in part Defendant, CBI-Illinois' ("CBI"), Motion for Partial Summary Judgment. During the analysis, this Court determined that one of the issues presented by the parties could not be ruled upon, as it would constitute an advisory opinion. Cvelbar asks this Court to revisit its summary judgment decision and rule on the issue of whether or not the severance benefits paid to him by CBI constitute a "golden parachute" as defined by § 280G of the Internal Revenue Code. This Court DENIES the Motion to Amend.

A Motion to Amend pursuant to Federal Rule 59(e), is for all intents and purposes, a motion to reconsider. *See Sutliff, Inc. v. Donovan Companies, Inc.*, 727 F.2d 648, 652 (7th Cir. 1984). A motion to reconsider is only avail-

able to "correct manifest errors of law or fact or to present newly discovered evidence." *Publishers Resource Inc. v. Walker-Davis Publications, Inc.*, 762 F.2d 557, 561 (7th Cir. 1985) (quoting *Keene Corp. v. International Fidelity Ins. Co.*, 561 F.Supp. 656, 665-66 (N.D.Ill. 1982)). Motions to reconsider are not to be used to "rehash" the arguments presented during the motion for summary judgment. *In re Oil Spill by "Amoco Cadiz"* 794 F.Supp. 261, 267 (N.D.Ill. 1992).

Cvelbar does not assert that this Court's ruling contains a manifest error of law or fact. He contends that this Court should have ruled on the issue of whether his employee benefits constituted a "golden parachute" because the Employer-Employee Agreement ("Agreement") should be interpreted by reference to § 280G of the Internal Revenue Code. Cvelbar's error is that the Agreement does not require CBI to determine if the payments are in fact "parachute payments" as defined in § 280G. The Agreement gave CBI sole authority to deem the payments "contingent upon a change in ownership or control." This Court utilized both § 280G of the Code and the Proposed Regulations to determine whether CBI acted arbitrarily or capriciously under the terms of the Agreement. This Court stands by its holding that the issue of whether the severance payments did, in fact, constitute "golden parachute" payments as defined by the Internal Revenue Code is not relevant to the issues presented in the Complaint.

Conclusion

For the reasons stated herein, this Court DENIES the Motion to Amend.

ENTERED this 7th day of February, 1996.

/s/_____
Michael M. Mihm
Chief United States District Judge

[Dated January 16, 1996]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

ANTHONY W. CVELBAR,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 95-1127
	)	
CBI-ILLINOIS, a Delaware Corporation,	)	
	)	
	)	
Defendant.	)	

ORDER

Before this Court are Plaintiff's Motion for Partial Summary Judgment [10], Defendant's Motion for Partial Summary Judgment [15], and Plaintiff's Motion to Strike [24]. For the reasons set forth herein, the Plaintiff's Motion for Partial Summary Judgment is DENIED, the Defendant's Motion for Partial Summary Judgment is GRANTED, and the Plaintiff's Motion to Strike is DENIED.

Factual Background

Each of the parties has submitted Statements of Undisputed Facts and Statements of Disputed Facts. A background of the case was culled from all of the available documents. Plaintiff, Anthony W. Cvelbar (hereinafter "Cvelbar"), worked as the Executive Vice President for The First National Bank of Peoria, which operated as a wholly-owned subsidiary of First Peoria Corporation (hereinafter "First Peoria"). In March 1990, Cvelbar en-

tered into an Employer-Employee Agreement (hereinafter "Agreement") with First Peoria. The Agreement provides, in relevant part, as follows:

> In order to induce the Employee to remain in the employ of the Bank and its successors and not to seek employment with a competitor of the Company or the Bank within three years of termination of employment, the Agreement sets forth the severance benefits which the Company agrees will be provided to the Employee in the event that the Employee's employment with the Bank is terminated within the term of this Agreement, whether voluntary or involuntary.
>
> * * *
>
> 2. Employee's Agreement Not to Compete
>
> The Employee agrees that for a period of three years from the date of termination, the Employee will not become employed as an agent, consultant, employee, officer or director of (i) a commercial bank . . . located in the Standard Metropolitan Statistical Area encompassing the City of Peoria, Illinois. . . . If the employee breaches the terms of this paragraph, the Agreement shall terminate, no payments or benefits shall become payable thereafter, and all payments made under this Agreement shall be refunded by the Employee to the Company.
>
> 3. Certain Benefits Upon Termination
>
> A. If, within the term of this Agreement, the Employee's employment with the Company or Bank is terminated for any reason other than (a) death, (b) retirement, (c) the commission of a felony by the Employee or (d) the willful engaging by the Employee in acts constituting fraud, then the Employee shall be entitled to the benefits provided below upon termination of his employment.

* * *

4. Limitation on Amounts Payable

A. Notwithstanding anything contained in this Agreement to the contrary, in the event any payment to be made or benefit to be provided to the Employee pursuant to this Agreement is deemed, in the sole opinion of Company's counsel, to be contingent on a "change in ownership or control" or otherwise would be subject to the provisions of Section 280G of the Internal Revenue Code of 1986, as amended (the Code), then the total amount of payments or benefits to be provided to the Employee pursuant to this Agreement shall be reduced so that the aggregate present value of all said payments does not exceed 299% of the Employee's Average Annual Compensation as Defined by the Code.

(Exhibit 1 to Defendant's Statement of Undisputed Facts).

On or about June 1, 1992, First Peoria merged with Defendant CBI-Illinois. (hereinafter "CBI"). Cvelbar admits that this merger constituted a "change of ownership or control." (Response Mem. to Defendant's Motion for Summary Judgment, at 2). A Plan of Merger dated December 6, 1991 governed the merger and provided that CBI expressly assumed First Peoria's obligations under the Agreement. CBI terminated Cvelbar in October 1992. The parties do not dispute that the Agreement is binding upon CBI. CBI made payments under the Agreement until December 1994, at which time it ceased making payments. CBI claims that no additional payments are due to Cvelbar.

In the case at bar, Cvelbar filed a one-count Amended Complaint on June 20, 1995. In his Complaint, Cvelbar alleges that CBI violated the Employee Retirement In-

come Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.* In his Complaint, Cvelbar asserts that the Agreement constitutes an employee benefit plan and that CBI is the administrator of the "plan." In its Answer, CBI denies each of these allegations, but for purposes of its Motion for Summary Judgment assumes these assertions are true. Cvelbar claims that the cessation of payments in December 1994 was erroneous and wrongful under 29 U.S.C. § 1132(a)(1)(B). This Court's jurisdiction arises pursuant to 28 U.S.C. § 1331.

Discussion

A. *Motions for Partial Summary Judgment*

A motion for summary judgment will be granted where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party has the responsibility of informing the court of portions of the record or affidavits that demonstrate the absence of a triable issue. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552 (1986). The moving party may meet its burden of showing an absence of material facts by demonstrating "that there is an absence of evidence to support the non-moving party's case." *Id.*, at 325, 106 S.Ct. at 2553. Any doubt as to the existence of a genuine issue for trial is resolved against the moving party. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513 (1986); *Cain v. Lane*, 857 F.2d 1139, 1142 (7th Cir. 1988).

If the moving party meets its burden, the non-moving party then has the burden of presenting specific facts to show that there is a genuine issue of material fact.

Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 106 S.Ct. 1348, 1355-56 (1986). Federal Rule of Civil Procedure 56(e) requires the non-moving party to go beyond the pleadings and produce evidence of a genuine issue for trial. *Celotex Corp.*, 477 U.S. at 324, 106 S.Ct. at 2553. This Court must then determine whether there is a need for trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may be reasonably resolved in favor of either party. *Anderson*, 477 U.S. at 250, 106 S.Ct. at 2511.

In support of Cvelbar's Motion for Partial Summary Judgment, he submits the following arguments: (1) the Agreement does not constitute a "golden parachute" under § 280G of the Internal Revenue Code and (2) if this Court determines that the Agreement is a "golden parachute", the Defendant breached an implied covenant of good faith and fair dealing. The Defendant argues as follows: (1) that pursuant to § 280G, the Agreement is a "golden parachute" and (2) it acted in good faith.

It is important to note at the outset that this lawsuit arises under ERISA's civil enforcement provision, § 1132, which provides that a plan participant may bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). As Cvelbar's claim for severance benefits is essentially a matter of contract interpretation, *Hickey v. A.E. Staley Mfg.*, 995 F.2d 1385, 1389 (7th Cir. 1993) special attention must be paid to the terms of the plan. If the terms of the Agreement are unambiguous as a matter of law, no extrinsic evidence may be considered. *Id.* Summary judgment is not

appropriate unless the "pertinent provisions of the contractual documents are unambiguous." *Ryan v. Chromalloy American Corp.*, 877 F.2d 598, 602 (7th Cir. 1989).

In the case at bar, the Agreement provided in a section entitled "Limitation on Amounts Payable" that:

> [I]n the event any payment to be made . . . to the Employee . . . is deemed, **in the sole opinion of Company's counsel,** to be contingent on a "change in ownership or control" . . . then the total amount of payments or benefits to be provided . . . shall be reduced so that the aggregate present value of all said payments does not exceed 299% of the Employee's Average Annual Compensation . . .

(Exhibit 1 to Defendant's Statement of Undisputed Facts) (emphasis added). This language clearly vests in the corporate counsel an authority to deem certain payments to be contingent upon a change in ownership. This language is not subject to "'reasonable alternative interpretations,'" and therefore is unambiguous. *Hickey*, 995 F.2d at 1389 (quoting *Taylor v. Continental Group*, 933 F.2d 1227, 1232 (3d Cir. 1991)). No extrinsic evidence will be considered in resolving this facet of the Motions for Summary Judgment. *Ryan, supra* at 602.

Although the parties have comprehensively briefed the issue of whether Cvelbar's severance package was "contingent on a change in ownership or control," the first issue which must be addressed is what rights Cvelbar may enforce under the Agreement. It is beyond cavil that Cvelbar may not seek to enforce, through § 1132(a)(1)(B), rights not conferred upon him by the Agreement. Cvelbar's right to the benefits enumerated in paragraph 3(A) of the Agreement are limited by the operation of paragraph 4. Paragraph 4 essentially provides that, notwith-

standing any other terms in the Agreement, if the Company's counsel deems the payments to Cvelbar to be contingent upon a change in ownership or control, Cvelbar is only entitled to 299% of his Average Annual Compensation. The Company's in-house counsel, James Swarts, deemed the payments to Cvelbar to be contingent upon a change in ownership or control. To this extent, the Agreement entitles Cvelbar to no more than 299% of his Average Annual Compensation.

In resolving the parties' Motions for Summary Judgment, it is not relevant whether the severance payments are in fact parachute payments. The Complaint seeks relief due to the alleged wrongful denial of benefits. Whether the payments made to Cvelbar are "parachute payments," as defined in § 280G of the Code, is not germane to the issues presented in the Complaint. The Agreement provides that once CBI deems the payments contingent upon a change in ownership or control, Cvelbar is only entitled to 299% of his Average Annual Compensation. This Court will not enter summary judgment in favor of either party on this matter, as it would constitute an advisory opinion.

Cvelbar also argues that the Agreement contains an implied covenant of good faith and fair dealing and that CBI breached that implied covenant. In support of this argument, Cvelbar cites *Capital Options Investments, Inc. v. Goldberg Bros. Commodities, Inc.*, 958 F.2d 186 (7th Cir. 1992), and *Tektel, Inc. v. Maier*, 813 F.Supp. 1331 (N.D.Ill. 1992). Neither *Capital Options* nor *Tektel* arise under ERISA and, therefore, are inapplicable to the case at bar.

In response to Cvelbar's good faith argument, CBI asserts that this Court must utilize the standard of review

set forth by ERISA case law. CBI is correct. In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115, 109 S.Ct. 948, 956-57 (1989), the Court held that in an action arising under § 1132(a)(1)(B) a district court's review of the denial of benefits under an ERISA plan is *de novo* unless the plan gives the administrator discretion to determine benefits eligibility. In the case at bar, there is no dispute that the Agreement gave the Defendant sole discretion to determine whether the benefits paid were contingent upon a change in ownership or control. Thus, this Court reviews the discretionary decision of CBI under an arbitrary and capricious standard. *Loyola University of Chicago v. Humana Ins. Co.*, 996 F.2d 895, 898 (7th Cir. 1993) ("In the event that the administrator's discretion is unrestrained or limited only by the requirement of good faith, the arbitrary and capricious standard of review is proper."). The arbitrary and capricious standard includes a requirement of good faith. *Reilly v. Blue Cross and Blue Shield United of Wisconsin*, 846 F.2d 416, 419 (7th Cir.), *cert. denied*, 488 U.S. 856 (1988).

CBI moves for summary judgment on the issue of whether it acted in bad faith. At summary judgment, it is not sufficient for the plaintiff to simply allege bad faith. The non-movant must offer some evidentiary support for that assertion. *Allison v. Dugan*, 951 F.2d 828, 833 (7th Cir. 1992). Once CBI has "pointed out to the district court—that there is an absence of evidence to support the non-moving party's case," *Celotex*, *supra* at 325, the burden shifts to Cvelbar to demonstrate that the record contains evidence from which a jury could find that CBI acted in bad faith. *Anderson*, *supra* at 252. Cvelbar has failed to provide this Court with any evidence, other than his own deposition, that the CBI acted in bad faith regarding the characterization of his sever-

ance payments. Thus, "there can be no 'genuine issue of material fact,' since a complete failure of proof concerning an essential element of a non-moving party's case necessarily renders all other fact immaterial." *Celotex*, *supra* at 323. This Court will enter summary judgment in favor of CBI on the issue of bad faith.

This being said, however, the review is not complete. CBI also moves for summary judgment on the issue of whether its decision to deem the severance payments as "contingent upon a change in ownership or control" was arbitrary or capricious. The Internal Revenue Service's Proposed Regulations provide some insight on this issue. The Proposed Regulations, found in the *Federal Tax Coordinator 2d*, ¶ 151,143, state:

> In general, a payment will be treated as contingent on a change in ownership or control if the payment would not in fact have been made had no change in ownership or control occurred. A payment generally will be treated as one which would not in fact have been made in the absence of a change in ownership or control unless it is substantially certain, at the time of the change, that the payment would have been made whether or not the change occurred.

Additionally, a payment will be treated as contingent on a change in ownership or control "if (a) the payment is contingent on an event that is closely associated with such a change, (b) a change in ownership or control actually occurs, and (c) the event is materially related to the change in ownership or control."

The Proposed Regulations indicate that the termination of a disqualified individual's employment is considered to be "closely associated" with a change in ownership or control. Cvelbar asserts that he is not a disqualified individual within the meaning of the Internal Rev-

enue Code. This is not relevant. The only reason this Court is reviewing the Proposed Regulations is to determine whether CBI's decision to deem the payments "contingent" was arbitrary or capricious. Cvelbar was clearly a key employee in the bank, as he functioned as the executive vice president and was one of only a handful of employees who were given severance agreements. It is neither arbitrary nor capricious to deem a key employee's termination, which occurred approximately four months after the merger, as "closely associated" with a change in ownership or control.

There is no question that a change in ownership or control actually occurred. Thus, the only remaining issue is whether Cvelbar's termination was "materially related" to the merger. The affidavit of Peter Callow indicates that he decided to terminate Cvelbar and that the primary reason for this decision was that Cvelbar exhibited a negative attitude toward the new ownership. In response to these statements, Cvelbar represents that his personnel file contains no reprimands or other negative comments. This assertion of Cvelbar's is not sufficient to create a genuine issue of material fact regarding the material relationship between his termination and the merger. Callow's decision to terminate Cvelbar is materially related to the change in ownership and control. Nothing submitted by Cvelbar, as the non-movant, establishes a genuine issue of material fact on this point. Therefore, this Court finds that CBI did not act arbitrarily or capriciously in deeming Cvelbar's severance payments to be "contingent upon a change in ownership or control."

B. *Motion to Strike*

Cvelbar moves to strike the affidavits of William H. Christianson, James L. Swarts, and Peter W. Callow. Cvelbar asserts that paragraph 6 of Christianson's affidavit violates the parole evidence rule. Cvelbar seeks to strike the entire affidavit of James L. Swarts and paragraph 7 of Peter Callow's affidavit.

In Christianson's affidavit, he states that the severance Agreement was made to "protect [Cvelbar] from adverse consequences arising out of possible changes in ownership or control." (Christianson Aff., at 2). The Agreement clearly protects Cvelbar from any termination, voluntary or involuntary, including termination due to a change in ownership or control. Therefore, the affidavit does not actually conflict with the Agreement. However, to the extent that it contradicts the unambiguous terms of the Agreement, it has been disregarded by this Court.

The only statement this Court considered from the Swarts affidavit was that, as Company counsel, he deemed the severance payments to be contingent upon a change in ownership or control. Cvelbar does not contest this fact, but instead argues that such a determination was an abuse of discretion. The Motion to Strike is denied as to the Swarts affidavit.

In Peter Callow's affidavit, he states that he terminated Cvelbar because he exhibited a negative attitude toward new management. Cvelbar moves to strike this statement because it violates 820 ILCS 40/4. This Illinois Statute provides that "[p]ersonnel records information which was not included in the personnel record but should have been as required by this Act shall not be used by an employer in a judicial or quasi-judicial proceeding." 820 ILCS 40/4. There is no indication from this

Court's review of the Act that an employer must record its determination that an employee was terminated due to his or her negative attitude. Therefore, this statute is inapplicable to the case at bar, and the Motion to Strike is denied as to paragraph 7 of Callow's affidavit.

Conclusion

For the reasons stated herein, Plaintiff's Motion for Partial Summary Judgment is DENIED in part on the merits and DENIED in part because this Court declines to issue an advisory opinion. Defendant's Motion for Partial Summary Judgment is GRANTED in part on the merits and DENIED in part because this Court declines to issue an advisory opinion. Partial Summary Judgment should be entered in favor of Defendant, CBI, and against Plaintiff, Anthony W. Cvelbar regarding the issues of bad faith, and the arbitrary and capricious standard of review employed in § 1132(a)(1)(B) cases. Further, Plaintiff's Motion to Strike is DENIED.

The parties are ORDERED to submit to this Court within fourteen (14) days a status report regarding what issues remain in this litigation.

ENTERED this 16th day of January, 1996.

/s/_____
Michael M. Mihm
Chief United States District Judge

(3)

FILED
JUN 24 1997
CLERK

No. 96-1854

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ANTHONY W. CVELBAR,

Petitioner,

v.

CBI-ILLINOIS, INC.,
a Delaware corperation,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO CERTIORARI

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13 pp

QUESTION PRESENTED FOR REVIEW

Should this Court issue a Writ of Certiorari to consider whether an employment agreement which provides deferred compensation to a member of a select group of management employees, which was one of five identical agreements providing deferred compensation to a select group of management employees, and which otherwise meets the requirements of an ERISA plan, can be an ERISA plan?

RULE 29.6 LIST

Respondent CBI-Illinois, Inc. is a subsidiary of Commerce Bancshares, Inc., and has no wholly or nonwholly owned subsidiaries.

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BRIEF OF RESPONDENT IN OPPOSITION TO CERTIORARI

Respondent, CBI-Illinois, Inc. ("CBI") respectfully requests that this Court deny the Petition For Writ Of Certiorari, seeking review of the Seventh Circuit Court of Appeals' opinion in this case. That opinion is reported at 106 F.3d 1368 (7th Cir. 1997). (For the convenience of the Court, all citations to the opinion will be to the opinion attached in the Appendix to the Petition.)

STATEMENT OF THE CASE

Petitioner Anthony W. Cvelbar's ("Cvelbar") Statement of the Case omits an important fact that was before the District Court and the Court of Appeals which justified summary judgment for Respondent CBI-Illinois, Inc. ("CBI") in this case.

The Employer-Employee Agreement ("Agreement") entered into by Cvelbar and his employer on March 22, 1990, was not executed in isolation. Rather, the Agreement was one of five identical agreements executed with top management employees for the purpose of providing deferred compensation to those employees. (Petition Appendix ("Pet.App.") 2, 4 n.1, 5 n.2, 14; Respondent Appendix ("Res.App.") 1.)

REASONS FOR DENYING THE WRIT

This Court should deny Certiorari in this case for two reasons: 1) the Question Presented by Cvelbar's Petition simply is not an issue presented by the facts of this case; and 2) even if the Question Presented in the Petition were an issue in this case, it is not an issue on which the courts of appeals are in conflict.

I. PETITIONER'S QUESTION PRESENTED IS NOT RELEVANT TO THIS CASE

The question of whether a one-person agreement is an ERISA plan is not presented by the facts of this case, and is not determinative of the outcome in this case. Petitioner's Agreement is not a "one-person" agreement. Rather, it was executed in connection with four other identical agreements. The Court of Appeals refers to this fact throughout its opinion, and Cvelbar admits this fact in his own affidavit. (Pet.App. 2, 4 n.1, 5 n.2, 14; Res. App. 1, 2.) Given that resolution of the question presented for review in this Court will not affect the outcome of this case, it would be inappropriate for this Court to grant certiorari on the Question Presented in the Petition.

The actual "question presented" to the District Court and the Court of Appeals was whether an employment agreement which provides deferred compensation to a member of a select group of management employees and which was one of five identical agreements providing deferred compensation to a select group of management employees, could be an ERISA plan if it otherwise met the requirements of an ERISA plan. However, it would be similarly inappropriate for the Court to grant certiorari on this issue because the courts of appeals are not in conflict on this issue. Simply stated, no issue presented in this case is appropriate for review by this Court.

II. THE COURTS OF APPEALS ARE NOT IN CONFLICT WITH RESPECT TO PETITIONER'S QUESTION PRESENTED

Even assuming that Cvelbar's Question Presented were actually an issue presented by the facts of this case, it would still be unnecessary for the Court to grant cer-

tiorari in this case. The courts of appeals are not in conflict with respect to the Question Presented in the Petition. Rather, the courts of appeals are in accord on this issue.

The Third, Fourth, Seventh, Ninth, and Eleventh Circuit Courts of Appeals have all held that a single-person agreement *can* be an ERISA plan if it otherwise meets ERISA's requirements. *See Duggan v. Hobbs*, 99 F.3d 307, 312 (3d Cir. 1996); *Biggers v. Wittek Industries, Inc.*, 4 F.3d 291, 297-8 (4th Cir. 1993); *Cvelbar v. CBI-Illinois, Inc.*, 106 F.3d 1368, 1376 (7th Cir. 1997); *Williams v. Wright*, 927 F.2d 1540, 1545 (11th Cir. 1991). CBI has been unable to identify any court of appeals that has held that a single-person agreement *cannot* be an ERISA plan.

Cvelbar is able to cite to only one court of appeals decision, *Fraver v. North Carolina Farm Bureau Mutual Insurance Co.*, 801 F.2d 675 (4th Cir. 1986), holding, arguably, that a one-person agreement is not an ERISA plan. However, a closer examination of *Fraver* reveals that the court in that case did not hold that a one-person agreement could *never* be an ERISA plan. Furthermore, the existence of the more recent Fourth Circuit Court of Appeals' decision in *Biggers* establishes that the position of the Fourth Circuit Court of Appeals is in accord with the other courts of appeals on the Question Presented.

Finally, the decision of the Court of Appeals in the present case does not contradict the prior holding of the Court of Appeals in *Nagy v. Riblet Products Corporation*, 79 F.3d 572 (7th Cir. 1996). In *Nagy*, the Court of Appeals held that "[c]ontracts between an employer and a single worker do not become ERISA trusts or plans . . . *just because* they deal with future payments." 79 F.3d at 574 (emphasis added). This holding does not exclude the pos-

sibility that such a contract *could be* an ERISA plan if it meets the other requirements of ERISA, as stated by the Court of Appeals in the present case. Thus, no contradiction exists in the Seventh Circuit on the Question Presented by the Petition.

Given that no conflict exists between the courts of appeals or within the Seventh Circuit Court of Appeals on the Question Presented in the Petition, this Court should deny certiorari. Moreover, there is no need for this Court to grant certiorari to "settle an important question of federal law." The courts of appeals and the United States Department of Labor, the agency charged with administration of ERISA, are in harmony on both the Question Presented in the Petition and the question actually presented by the facts of this case.

CONCLUSION

WHEREFORE, Petitioner prays that this Court deny the Petition For Writ Of Certiorari.

Respectfully submitted,

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RESPONDENT'S APPENDIX

[Filed August 16, 1995]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

ANTHONY W. CVELBAR, Plaintiff,	)	
vs.	)	Case No. 95-1127
CBI-ILLINOIS, INC., a Delaware corporation, Defendant.	)	

STATE OF ILLINOIS
COUNTY OF PEORIA—ss.

AFFIDAVIT OF ANTHONY CVELBAR

Anthony Cvelbar, being first duly sworn upon oath, deposes and says, that if called as a witness, he could competently testify to the following matters:

1. I told the president, Ron Morgan, in late 1989 or early 1990, that if an alternative job opportunity presented itself, I would pursue it because of the uncertainty of my future in our organization.

2. In early 1990, I was first informed that an employment agreement for certain senior management officials was being considered in order to induce us to stay with the organization in these times of uncertainty.

3. The employment agreement was drafted by Ron Morgan, president, and Dave Radley, attorney. The agreement was for a period of five years and was to be extended annually for one additional year each year.

4. At the time the agreement was drafted [several weeks prior to the date it was signed], Mr. Morgan and I discussed the fact that Section 280G of the Internal Revenue Code of 1986 could be applicable only if a change of control took place within one year of the contract date or any later significant amendment.

5. At the first anniversary date of the contract, in March of 1993, I again discussed Section 280G with Mr. Morgan, and it was decided not to request the Board to extend the contracts [all five of them] for a new five-year period because such extension could possibly be construed as a significant amendment that would trigger the presumption set out in Section 280G(b)(2)(C) of the Code. Mr. Morgan and I concluded that once we got by the 12-month period, we would then be safe from the application of the golden parachute rules.

6. In the fall of 1991, I was requested to voluntarily relinquish my rights under the Agreement in question. Specifically, I was offered stock options in Commerce Bankshares, Inc. in exchange for the waiver of my unilateral right to quit my job and thereby "trigger" the benefits. At that time, the Defendant did not want to incur the payments due to me under the contract, unless my employer elected to terminate my employment.

7. On October 6, 1992, I was advised in writing that my position had been eliminated and for that reason I was terminated. A true and correct copy of the Memorandum is attached to my Affidavit.

8. The October 6, 1992 Memo was handed to me by Mr. Callow at 5:05 P.M. At that time and date, Mr. Callow entered my office, sat in a guest chair, and handed the document to me without comment. After I read the Memo, I asked "Why?" and he responded that my position had been eliminated. I asked Mr. Callow when my termination was effective, and he responded "immediately," and informed me to make arrangements to remove my personal effects from the office later. I then followed Mr. Callow's directive by immediately ceasing my duties and leaving the building. At approximately 7:00 P.M. on October 6, I returned to my office and packed up and removed my personal belongings. My building keys were returned shortly thereafter.

9. I had no knowledge that Peter Callow perceived that I had a negative attitude until I read his Affidavit dated August 2, 1995.

FURTHER AFFIANT SAYETH NOT.

DATED: 8/14/95

/s/ ANTHONY CVELBAR

SUBSCRIBED AND SWORN TO BEFORE
ME THIS 14th DAY OF AUGUST, 1995.

/s/ BONNIE J. FARRELL, August 14, 1995

[Notarial Seal]